

**UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY**

Stephen M. Charne
Tara S. Sinha
WITMAN STADTMAUER, P.A.
26 Columbia Turnpike
Florham Park, New Jersey 07932-2213
(973) 822-0220

John M. Agnello
Melissa E. Flax
CARELLA, BYRNE, CECCHI,
OLSTEIN, BRODY & AGNELLO, P.C.
5 Becker Farm Road
Roseland, New Jersey 07068
(973) 994-1700

Attorneys for Plaintiffs

DR. FADI CHAABAN, DR. SABINO R.
TORRE, DR. CONSTANTINOS A.
COSTEAS, AND DR. ANTHONY J.
CASELLA as Trustees of Diagnostic &
Clinical Cardiology, P.A. Profit Sharing Plan,

Plaintiffs,

v.

DR. MARIO A. CRISCITO,

Defendant.

Case No. 2:08-cv-01567 (GEB/MCA)

**DECLARATION OF MELISSA E.
FLAX IN OPPOSITION TO
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT**

MELISSA E. FLAX, of full age and upon her oath, declares as follows:

1. I am an attorney at law in the State of New Jersey, and a partner of the law firm of Carella, Byrne, Cecchi, Olstein, Brody & Agnello, P.C., attorneys for plaintiffs Dr. Fadi Chaaban, Dr. Sabion R. Torre, Dr. Constantinos A. Costeas and Dr. Anthony J. Casella, as Trustees of Diagnostic & Clinical Cardiology, P.A. Profit Sharing Plan.

2. I submit this Declaration in opposition to Defendant's Motion for Summary Judgment.

3. Attached hereto as Exhibit 1 is a true and accurate copy of the Order entered by the Honorable William J. Martini, U.S.D.J. on June 24, 2008.

4. Attached hereto as Exhibit 2 is a true and accurate copy of Honorable William J. Martini, U.S.D.J. Opinion dated June 24, 2008.

5. Attached hereto as Exhibit 3 is a true and accurate copy of the Order entered by the Honorable Madeline Cox Arleo, U.S.M.J. on June 21, 2010.

6. Attached hereto as Exhibit 4 is a true and accurate copy of the transcript of the hearing before the Honorable Madeline Cox Arleo, U.S.M.J. on June 21, 2010.

7. Attached hereto as Exhibit 5 is a true and accurate copy of relevant portions of the deposition transcript of Brian Warnock dated July 15, 2009.

8. Attached hereto as Exhibit 6 is a true and accurate copy of the Smith Barney October 2007 statement.

I declare under penalty of perjury that the foregoing is true and accurate.
Executed on October 20, 2010.


MELISSA E. FLAX

EXHIBIT 1

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

**DR. FADI CHAABAN, DR. SABINO R.
TORRE, DR. CONSTANTINOS A.
COSTEAS, DR. ANTHONY J. CASELLA, as
trustees of Diagnostics & Clinical Cardiology,
P.A. Profit Sharing Plan,**

Plaintiffs,

v.

DR. MARIO A. CRISCITO,

Defendant.

08-CV-1567 (WJM)

ORDER

Defendant having filed a motion to dismiss; and for the reasons set forth in the accompanying Opinion and for good cause shown,

IT IS on this 24th day of June 2008, hereby

ORDERED that Defendant's motion is **DENIED**.

s/ William J. Martini
WILLIAM J. MARTINI, U.S.D.J.

EXHIBIT 2

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

**DR. FADI CHAABAN, DR. SABINO R.
TORRE, DR. CONSTANTINOS A.
COSTEAS, DR. ANTHONY J. CASELLA, as
trustees of Diagnostics & Clinical Cardiology,
P.A. Profit Sharing Plan,**

Plaintiffs,

v.

DR. MARIO A. CRISCITO,

Defendant.

**MASTER FILE: 08-CV-1567
(WJM)**

OPINION

HON. WILLIAM J. MARTINI

Stephen M. Charme
Witman, Stadtmauer & Michaels, P.A.
26 Columbia Turnpike
Florham Park, NJ 07932-2246

(Counsel for Plaintiffs)

Robert J. Conroy
Conroy & Schoppmann, PC
1120 Route 22 East
Bridgewater, NJ 08807

(Counsel for Defendant)

WILLIAM J. MARTINI, U.S.D.J.:

Defendant moves to dismiss Plaintiffs' ERISA claims on the grounds that

Plaintiffs filed them more than six years after Defendant's allegedly wrongful actions.

Although ERISA does provide a six-year statute of limitations, this period tolls if a

defendant conceals his wrongdoing until Plaintiff discovers or should discover it. Here, Plaintiffs adequately allege that Defendant concealed his wrongdoing, preventing Plaintiffs from discovering it until quite recently. Accordingly, Plaintiffs' claims as pled are timely, and Defendant's motion to dismiss is **DENIED**.

I. FACTS AND PROCEEDINGS

This case concerns Defendant's alleged concealed breach of his fiduciary duties to an employee benefit plan.¹ Plaintiffs are the current trustees of this plan. (Compl. ¶¶ 8–11.) They allege that Defendant, the former trustee, secretly diverted the plan's assets to his own benefit. (Compl. ¶¶ 1–7, 12.)

Plaintiffs allege that Defendant accomplished this diversion through a series of schemes spanning several decades until 2007, while he was the sole trustee. (Compl. ¶¶ 20–67.) For example, Plaintiffs allege that in 1982 Defendant borrowed money from the plan, part of which loan remains outstanding and part of which Defendant illegally repaid with contributions from the plan's employer. (Compl. ¶¶ 61–62.) Plaintiffs allege that in late 1999 and early 2000, Defendant purposely under-reported to the plan's third party administrator the values of certain of the plan's investment accounts (one account with Morgan Stanley and another with Smith Barney) and transferred the unreported overages to his own personal accounts. (Compl. ¶¶ 20–36.) Finally, Plaintiffs allege that

¹Because this is a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court recites the facts as alleged in the complaint in the light most favorable to Plaintiffs. See Victaulic Co. v. Tieman, 499 F.3d 227, 234 (3d Cir. 2007).

Defendant withdrew money from the plan on various occasions and guided it into his own personal accounts or used it to pay for goods or services that he purchased solely for his own benefit. (Compl. ¶¶ 43–58.)

Furthermore, Plaintiffs allege that Defendant intentionally concealed this diversion. (Compl. ¶ 2.) Plaintiffs allege that Defendant’s concealment precluded them from discovering his wrongdoing until they replaced Defendant as trustees, in 2007. (Compl. ¶ 6.)

Based on these allegations of over thirty years of wrongdoing, Plaintiffs filed the instant suit in March 2008. Plaintiffs claim that Defendant violated his fiduciary duties to the plan as set forth in the Employee Retirement Income Security Act (ERISA). (Compl. ¶¶ 68–75.)

Defendant now moves to dismiss Plaintiffs’ complaint under Federal Rule of Civil Procedure 12(b)(6). Defendant’s sole argument is that the complaint is barred by ERISA’s statute of limitations.²

II. DISCUSSION

Courts may dismiss a complaint under Rule 12(b)(6) if it fails to state claim upon which relief may be granted. Dismissal is thus proper where a claim is barred by a statute

²In Defendant’s reply, he also moves in the alternative for limited discovery on the ERISA statute of limitations issue, perhaps in preparation for a summary judgment motion. Because Defendant does not raise this issue until the reply, however, the Court will not consider it. See Bayer AG v. Schein Pharmaceutical, 129 F. Supp. 2d 705, 716 (D.N.J. 2001).

of limitations. Robinson v. Johnson, 313 F.3d 128, 135 (3d Cir. 2002). In evaluating a motion to dismiss, courts will accept the allegations in the complaint as true and view them in the light most favorable to the plaintiff. See Victaulic Co. v. Tieman, 499 F.3d 227, 234 (3d Cir. 2007).

Defendant argues that Plaintiffs' complaint fails to state a claim because all claims alleged are barred by ERISA's six-year statute of limitations. Defendant reasons that Plaintiffs did not file this complaint until March 2008 even though their claims stem from Defendant's alleged conduct occurring in some instances decades ago. Plaintiffs oppose and argue that ERISA's six-year statute of limitations tolled because Defendant intentionally concealed his breach from Plaintiffs. The Court agrees with Plaintiffs.

ERISA contains a statute of limitations for claims that a defendant has breached his fiduciary duties to an employee plan. Section 413 of ERISA, 29 U.S.C. § 1113, provides that a plaintiff must normally bring such a claim—at the latest—within six years of “the date of the last action which constituted a part of the breach or violation.” However, section 413 also contains an exception to this rule: “in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.”

When determining whether an ERISA fiduciary has concealed a breach of his fiduciary duties and thus tolled the statute of limitations until plaintiffs should or did discover the breach, the question is “whether there is evidence that the defendant took

affirmative steps to hide its breach.” Kurz v. Phila. Elec. Co., 96 F.3d 1544, 1552 (3d Cir. 1996). The statute of limitations does not toll merely because the fiduciary’s misconduct was innately difficult to detect; the fiduciary must act affirmatively to conceal the wrongdoing. Ranke v. Sanofi-Synthelabo Inc., 436 F.3d 197, 204 (3d Cir. 2006). For example, the District Court for the Eastern District of Pennsylvania has held that ERISA’s statute of limitations did not toll for claims that an employer merely failed to inform his employees of their eligibility for an employee benefit plan because there was no evidence that the employer took affirmative steps to prevent the employees from discovering their eligibility. Keen v. Lockheed Martin Corp., 486 F. Supp. 2d 481, 493 (E.D. Pa. 2007). In contrast, this Court has held that ERISA’s statute of limitations tolls on claims for breach of fiduciary duty where the defendant made misrepresentations and omissions to plaintiffs to prevent them from learning of the breach. Finley v. Dun & Bradstreet Corp., 471 F. Supp. 2d 485, 493 (D.N.J. 2007).

Here, Plaintiffs clearly allege that Defendant made affirmative misrepresentations to conceal his wrongdoing. The complaint contains at least the following relevant allegations:

During his tenure as trustee [Defendant] ensured that nobody . . . received any information about his handling of Plan assets, and knowingly, intentionally and fraudulently failed to supply appropriate and correct information to the third-party administrator (Compl. ¶ 2.)

. . . .

[I]n order to retain for his own account balance the lion's share of the increase in the value of the Morgan Stanley Account, defendant knowingly, intentionally, and fraudulently concealed and falsified the true 1999 year-end value of this account that he communicated to the third-party administrator as well as to the other Plan participants. (Compl. ¶ 25.)

....

As a further direct result of defendant's fraud, he knowingly, intentionally and fraudulently caused the Plan to file a false annual tax return for 1999 (known as Form 5500) with governmental agencies that grossly understated the true value of Plan assets for 1999. (Compl. ¶ 41.)

Accepting these allegations as true, as the Court must on a motion to dismiss, they clearly support a finding that Defendant intentionally concealed his breach of fiduciary duties to the ERISA plan.

Defendant also contends that even if Plaintiffs do allege that he intentionally concealed his fraud, their complaint is deficient because it fails to allege that they exercised due diligence in attempting to discover this fraud. Again the Court disagrees. Defendants are correct that ERISA's statute of limitations only tolls until Plaintiffs could have discovered Defendant's fraud with reasonable diligence. Kurz, 96 F.3d at 1552. Here, however, Plaintiffs' complaint sets forth several allegations supporting a conclusion that they could not have discovered Defendant's fraud—even with reasonable diligence:

It was not until after defendant's removal as the sole trustee in July 2007, that the current trustees of the Plan had access to information and documents that disclosed defendant's massive fraud and wrongdoing, the full extent of which is still not known. (Compl. ¶ 6.)

....

[Defendant] arranged for all information about the Plan to be sent directly to him at his home rather than to the office of [the plan's employer], where other Plan participants might have access to it. As described herein, he did so to conceal his use of Plan assets for his own personal benefit in breach of his fiduciary duties under ERISA. (Compl. ¶ 19.)

Again, accepting these allegations as true and viewing them in the light most favorable to Plaintiffs, the Court finds that they support a conclusion that Plaintiffs could not have discovered Defendant's fraud until they replaced Defendant as a trustee in July 2007. Accordingly the Court holds that under the facts alleged in the complaint, the statute of limitations on Plaintiffs' claims did not begin to run until that date. Plaintiffs' claims as presented in their complaint are thus timely filed.

III. CONCLUSION

The Court holds that under the facts as alleged in Plaintiffs' complaint, Plaintiffs have filed this suit within ERISA's six-year statute of limitations. Defendant's motion to dismiss is accordingly **DENIED**. An Order accompanies this Opinion.

s/ William J. Martini
William J. Martini, U.S.D.J.

EXHIBIT 3

Case 2:08-cv-01567-GEB -MCA Document 52 Filed 06/21/10 Page 1 of 2

Case 2:08-cv-01567-GEB -MCA Document 42-5 Filed 04/26/10 Page 1 of 2

**KERN AUGUSTINE
CONROY & SCHOPPMANN, P.C.**
1120 Route 22 East
Bridgewater, New Jersey 08807
(908) 704-8585
Attorneys for Defendant
RC-8922

DR. FADI CHAABAN; DR. SABINO R. TORRE;) UNITED STATES DISTRICT COURT
DR. CONSTANTINOS A. COSTEAS and) DISTRICT OF NEW JERSEY
DR. ANTHONY J. CASELLA, as Trustees of)
Diagnostic & Clinical Cardiology, P.A.) Civil Action
Profit Sharing Plan,) Case No. 2:08-cv-1567 (GEB-MCA)
)
Plaintiffs,)
)
v.) ORDER GRANTING <i>Denying</i>
) LEAVE TO FILE THIRD-PARTY,
DR. MARIO A. CRISCITO,) COMPLAINT, PURSUANT
) TO FED. R. CIV. P. 14(a)
)
Defendant,)
)
and)
)
DR. MARIO A. CRISCITO,)
)
Third-Party Plaintiff,)
)
v.)
)
AMERICAN PENSION CORPORATION;)
BRIAN P. WARNOCK and DOMINIQUE)
SANDRA ECK,)
)
Third-Party Defendants.)

THIS MATTER, having been opened to the Court by Kern Augustine Conroy & Schoppmann, P.C., counsel for the defendant, Dr. Mario A. Criscito ("Dr. Criscito") by way of motion for leave to file a third-party complaint, and this Court having considered the moving papers,

Case 2:08-cv-01567-GEB -MCA Document 52 Filed 06/21/10 Page 2 of 2

Case 2:08-cv-01567-GEB -MCA Document 42-5 Filed 04/26/10 Page 2 of 2

as well as any papers submitted in opposition or in reply, and having heard any oral arguments offered by counsel, *on 21 June 2010* and good cause therefor having been shown;

IT IS, on this 21 day of June, 2010;

Denied.
ORDERED, that Dr. Criscito's motion **BE**, and hereby IS, **GRANTED**; and it is further

ORDERED, that, within ten (10) days of defendant's counsel's receipt of this executed Order, the original proposed third-party complaint, in the form submitted in support of this motion, shall be electronically filed with the Clerk of the Court and a true copy electronically served upon counsel for the plaintiff and third-party defendants; and it is further

ORDERED, that counsel for the moving party shall serve a true copy of this executed Order upon all counsel of record in this matter within _____ days of counsel's receipt of same.


Hon. Madeline Cox Arleo, U.S.M.J.

EXHIBIT 4

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF NEW JERSEY

3 CHAABAN, et al.,
4 Plaintiffs,
5 vs.
6 CRISCITO,
7 Defendant.

.
.
.
. Case No. 2:08-cv-01567
.
. Newark, New Jersey
. June 21, 2010
.
.
.

8
9
10 TRANSCRIPT OF HEARING
11 BEFORE THE HONORABLE MADELINE ARLEO
12 UNITED STATES MAGISTRATE JUDGE

13 APPEARANCES:

14 For the Plaintiffs: STEPHEN M. CHARME, ESQ.
15 Witman, Stadtmauer & Michaels, P.A.
16 26 Columbia Turnpike
17 Florham Park, NJ 07932-2246

18 JOHN MICHAEL AGNELLO, ESQ.
19 Carella, Byrne, Cecchi, Olstein,
20 Brody & Agnello, P.C.
21 5 Becker Farm Road
22 Roseland, NJ 07068

23 For the Defendant: STEVEN I. KERN, ESQ.
24 CONROY & SCHOPPMANN, PC
25 1120 ROUTE 22 EAST
BRIDGEWATER, NJ 08807

Audio Operator:

22 Transcription Service: KING TRANSCRIPTION SERVICES
23 65 Willowbrook Boulevard
24 Wayne, New Jersey 07470
25 (973) 237-6080

Proceedings recorded by electronic sound recording;
transcript produced by transcription service.

1 (Commencement of proceedings at 12:22 p.m.)

2

3 THE COURT: -- Criscito. Could I have appearances,
4 please?

5 MR. CHARME: Stephen Charme, Witman Stadtmauer for
6 the plaintiff trustees.

7 THE COURT: Okay.

8 MR. AGNELLO: John Agnello also for plaintiffs'
9 trustees.

10 THE COURT: Okay.

11 MR. KERN: Steven Kern, Kern Augustine Conroy &
12 Schoppmann on behalf of Dr. Criscito.

13 THE COURT: Okay. Have a seat, everyone. Let me
14 just put a -- this motion in a little bit of factual context.

15 This is a motion of Dr. Criscito seeking leave to
16 file a third-party complaint pursuant to Fed. R. Civ. P.
17 14(a). Plaintiffs Dr. Fadi Chaaban, Dr. Sabino Torre,
18 Dr. Constantinos Costeas, and Dr. Anthony Casella are
19 trustees of Diagnostic & Clinical Cardiology, a profit
20 sharing plan, which is the subject this action.

21 The complaint as -- alleges as follows: Criscito
22 intentionally concealed his breach of fiduciary duties to the
23 plan, its beneficiaries and participants. Specifically
24 Criscito, the former trustee, secretly diverted the plan's
25 assets to his own benefit. Criscito accomplished this

1 unlawful conduct through a series of schemes spanning decades
2 until 2007 when he was the sole trustee. Plaintiffs did not
3 discover Criscito's fraudulent scheme until they replaced him
4 as trustee in 2007. Based on this alleged wrongdoing,
5 plaintiffs filed this action in March of 2008. They claim
6 that Criscito violated his fiduciaries duties to the plan as
7 set forth in the Employee Retirement Income Security Act,
8 otherwise known as ERISA. And I should note for the record,
9 that there is no claim of negligence; it's an intentional
10 tort and a fraud claim brought under ERISA.

11 And to proceed to the instant motion, on June 16th,
12 2009, plaintiffs' counsel deposed Brian Warnock, who was a
13 vice president of the American Pension Corporation, an
14 independent third-party administrator, who was retained to
15 administer the functions of the plan. According to Criscito,
16 during Warnock's deposition, he admitted that APC possessed
17 brokerage account statements from early 2000, which had they
18 been reviewed, would have no later than October of 2001
19 revealed the discrepancies in the valuation of the plan's
20 assets, which would have prevented Criscito's alleged
21 fraudulent scheme, or, I guess, would have at least brought
22 it to light. And that is at admission on April 26, 2010,
23 Criscito filed this motion to implead APC, Mr. Warnock, and
24 Sandra Eck [phonetic], a pension consultant of APC, as
25 third-party defendants. Criscito seeks to assert common law

1 | claims for indemnification and contribution against the
2 | third-party defendants based on their negligence. Criscito
3 | alleges that Warnock and/or Eck had a duty to correct any
4 | inaccuracies and/or omissions concerning the valuation of the
5 | plan assets, based on the brokerage account statements in
6 | their possession; yet they failed to discover any alleged
7 | discrepancies between the true valuation of the alleged
8 | value- -- and the alleged valuation that Criscito had
9 | provided. As such, according to Criscito, the proposed
10 | third-party defendants negligently performed their duties
11 | "with respect to the administration of the plan."

12 | Thus, he claims that in the event that he is liable
13 | to the plaintiffs based on his actions while trustee of the
14 | plan, the third-party defendants are bound to indemnify
15 | Criscito and contribute to any judgment against him based on
16 | any lawsuits, costs, and as a result of third-party
17 | defendants' negligence. In support of this motion, Criscito
18 | submits that the motion is timely and that his third-party
19 | complaint will not cause any undue prejudice.

20 | Plaintiff opposes -- plaintiffs oppose the motion
21 | on several grounds that -- that the indemnification and
22 | contribution claims are preempted by ERISA and thus barred;
23 | that Criscito cannot state a claim for contribution or
24 | indemnification, his claims are barred by the applicable
25 | statute of limitations governing medical- -- malpractice

1 | claims. There is no basis under ERISA to sue
2 | non-fiduciaries, including the third-party defendants, and
3 | admit that if APC was a fiduciary, Criscito could not assert
4 | indemnification and contribution claims against a third-party
5 | administrator Warnock or Eck.

6 | Rule 14(a) says that a party must serve a
7 | third-party -- summons within 14 days after filing its answer
8 | or must seek leave from court to do so, and that's why this
9 | instant motion is before us.

10 | I'd like to begin by asking Mr. Kern a question. I
11 | know there's a lot of issues here today. But it's -- it's
12 | really a basic one that goes to futility, and that is whether
13 | the proposed amended -- pleading states a claim for
14 | indemnification and contribution. And your brief did not
15 | indicate nor has my research disclosed any cases where a
16 | claim for either contribution or indemnification can arise
17 | where -- in favor of any tort-feasor who was -- who was
18 | alleged to have intentionally caused the harm. All the cases
19 | talk about joint tort-feasors under negligence theories.
20 | There's no cases out there where there is solely claims of
21 | intentional fraud and then indemnification and contribution
22 | claims based on negligence. They don't exist.

23 | And there's some -- there's some very strong
24 | language in the Restatement of Torts that says that is not
25 | permitted. Because as I understand your claim, it's --

1 plaintiffs' claim is that Dr. Criscito committed a fraud on
2 us and stole our money, and your contribution and
3 indemnification claim is, well, the third-party
4 administrators should have discovered my fraud, and therefore
5 they're liable to the plaintiffs too.

6 Is there any other way really to describe your
7 third-party complaint?

8 MR. KERN: If, indeed -- and I think you're
9 correct, plaintiffs' claim is limited to one of fraud.

10 THE COURT: It is.

11 MR. KERN: You're right. I think you raise an
12 interesting point and frankly one where that I'm not sure
13 that we've given much consideration to. But --

14 THE COURT: Because -- because think about the
15 whole notion of contribution indemnification as principles.
16 Contribution -- indemnification says, I didn't do it, the
17 other person's primarily liable. And on the face of the
18 pleadings, that just cannot be, because the theory is you did
19 it intentionally, you went and you stole our money, so
20 there's no way on that intentional theory, you could --
21 Criscito could say to the folks that didn't catch his
22 wrongdoing, you're primarily label. So I'm not sure how you
23 can even state a claim for indemnity.

24 But when we get to contribution, which is we're all
25 liable, we're all tort-feasors, the case when there's a

1 four-party collision and everyone did something wrong on the
2 highway and we bring in all the tort-feasors and -- on a
3 negligence theory.

4 I haven't seen any cases, and I've looked very,
5 very carefully for contribution theories where the -- in
6 favor of the tort-feasor who -- who the only theory against
7 him is intentional harm. In fact, that's the third -- the
8 second -- the restatement section of torts, says there's no
9 right of contribution in favor of any tort-feasor who has
10 intentionally caused the harm. That's been adopted by the
11 New Jersey courts. And I didn't see any law that's ever
12 recognized a contribution theory in this intentional
13 tort-feasor versus negligence context.

14 MR. KERN: It is an interesting question,
15 obviously. It's not one that was raised by the plaintiffs.
16 And frankly, I -- I can't tell that I've considered it at any
17 length.

18 But from what you're saying, Your Honor, I can't
19 tell you that you're wrong. And indeed, I -- it sounds like
20 you're most probably right, but honestly, it's not something
21 I've addressed.

22 THE COURT: Let me ask you a question about
23 standing. I know that the plaintiffs have talked about
24 standing under ERISA based on fiduciary status. But there's
25 some more basic standing concepts out there that talk about

1 that a plaintiff must have personally suffered some actual or
2 threatened injury as a result of defendant's alleged conduct.

3 So how does he have stand- -- when the theory is
4 you defrauded us, and his -- here's your theory against the
5 other tort-feasor or the proposed tort-feasor is you should
6 have let -- you should have -- you should have picked up my
7 wrongdoing earlier, how come he said that he has personally
8 suffered some injury as a result of their conduct?

9 MR. KERN: I think, again, if we're limiting
10 this -- and you're right -- to a fraud base, then there is
11 none.

12 THE COURT: Okay.

13 MR. KERN: I think you're --

14 THE COURT: Anything else you want to add?

15 MR. KERN: No, I -- you've stumped me, Your Honor.
16 I think you're --

17 THE COURT: Okay.

18 Mr. Agnello, anything you want to add?

19 MR. AGNELLO: Mr. Charme is going to argue the
20 motion, Judge, but no, I don't think we have anything to add.

21 MR. CHARME: I really have nothing to add to what
22 Your Honor has said.

23 THE COURT: Okay. I'm -- I think you see where I'm
24 headed. And I just want the record to be clear. There's a
25 lot of issues were raised by the -- both parties. And I

1 think there's four fundamental points that make this motion
2 both untimely, prejudicial, and futile under the proposed
3 pleading, and for that reason I'm denying the motion to -- to
4 amend -- for leave, rather, to file a third-party complaint.
5 And I want to go through my reasons.

6 The first issue is whether the third-party claims
7 are dependent on the outcome of the main claim.
8 Rule 14(a) -- third-party complaints under 14(a) can only be
9 asserted when the third party's liability is in some way
10 dependent on the outcome of the main claim or when the third
11 party is secondarily liable to the defendant. If the claim
12 is separate or independent, the pleading will be denied. The
13 crucial characteristic of a Rule 14 third-party claim is that
14 the original defendant is attempting to transfer to the
15 third-party defendant all or part of the liability asserted
16 against the original plaintiff. And that's from In re One
17 Meridian Plaza Fire Litigation, 820 F. Supp. 1492 (E.D. Pa.
18 1993).

19 Here, the essence of this case is Criscito's
20 alleged concealed breach of his fiduciary duties owed to the
21 plan. His indemnification and contribution claim against
22 APC, Warnock, and Eck are separate and independent from the
23 main fraud under ERISA. Specifically, the liability of APC,
24 Warnock, and/or Eck as third-party defendants is not
25 derivative of Criscito's liability concerning his diversion

1 of the plan assets for his own benefit. Criscito
2 theoretically could file a separate professional and
3 malpractice action against them if a judgment is rendered
4 against him in this case. Thus, Criscito cannot maintain a
5 third-party action for contribution and indemnification
6 against APC, Warnock, and Eck.

7 Although -- second, I want to talk about standing.
8 Although it was not raised precisely in this way by the
9 parties, the Court finds that Criscito lacks standing to file
10 a third-party complaint on his indemnification and
11 contribution claims. To have standing, a plaintiff must have
12 personally suffered some actual or threatened injury as a
13 result of defendant's unlawful conduct. That's the Gariano
14 [phonetic] case at 845 F. Supp. 1074 (D.N.J. 1994). A
15 plaintiff must be asserting his own legal rights in the case,
16 not those of third parties.

17 Finally, a plaintiff's injuries must be within his
18 own -- as protected by the law from which the claim arises.

19 Here, plaintiffs have sued Criscito for his alleged
20 concealment of breach of fiduciaries owed to the plan. As
21 successive fiduciaries under ERISA, plaintiff -- plaintiffs
22 seek on behalf of the plan and its participants and
23 beneficiaries, to recover assets that belong to the plan, its
24 participants and beneficiaries, and also seek relief
25 related -- related relief, such as punitive damages.

1 In his proposed third-party complaint, Criscito
2 claims that in the event he is liable for this wrong -- this
3 intentional wrongdoing, based on his neg- -- based on his
4 actions with respect to the plan, the third-party defendants
5 are bound to indemnify him for any judgment rendered against
6 him based upon any losses caused to him as a result of
7 third-party defendants' negligence.

8 The Court finds that Criscito failed to establish
9 that his losses, if any, were the result of the alleged
10 negligence or APC, Warnock or Eck. Although plaintiffs may
11 have a viable claim against him for their alleged breach of
12 duties as third-party administrator, any relief that
13 plaintiff may seek against the third-party administrator
14 would not appear to reflect plaintiffs' actions against
15 Criscito based on his alleged fraudulent scheme to divert the
16 plan's assets.

17 Additionally, Criscito could not demonstrate that
18 his interests are within -- in his of interests protected by
19 the law from the -- from which his claims arise, the
20 accused -- he was accused of undertaking a fraudulent scheme,
21 while serving as the plan's trustee for his own financial
22 gain. Such interest cannot be said to be protected by the
23 law.

24 I'm going to talk for a little bit about undue
25 delay and timeliness. And I say that mindful that this is a

1 case that was filed in '08, over two years ago. Purpose of
2 Rule 14(a) is to avoid security of action and multiplicity of
3 litigation. That principle is well settled. However,
4 joinder of third-party defendants under Rule 14 is not
5 automatic. The decision to permit joinder rests with the
6 sound discretion of the court. Courts have considered the
7 following factors in exercising their discretion on whether
8 to permit the filing of a third-party complaint: Timeliness,
9 probability of trial delay, potential for complication of
10 issues at trial, and prejudice to the original plaintiffs.

11 A motion brought under 14(a) is not alleged under
12 the same standards as a motion seeking leave to amend the
13 pleadings under 15(a). And that requires a court to look at
14 undue delay, bad faith and dilatory motive, repeated failure
15 to cure deficiencies in the pleadings, and undue prejudice to
16 the opposing party by virtue of the allowance of the
17 amendment.

18 With respect to delay, the Third Circuit has said
19 that the package of time without more does not require that a
20 motion to amend be denied. However, at some point, the delay
21 would become undue, placing an unwarranted burden on the
22 Court, or it will become prejudicial, placing an unfair
23 burden on the opposing party. The question of undue delay
24 requires a focus on the plaintiffs' motives for not amending
25 the complaint to assert the claim earlier.

1 Additionally, whether the pleading would be futile,
2 such as when the proposed claim provides an illegal basis for
3 relief, a judge may properly deny a 14(a) motion.

4 Here, the Court is satisfied that there was undue
5 delay in bringing this motion here. Just -- based on the
6 allegations in the complaint, in the third-party complaint,
7 Criscito knew the crucial facts back in 2000. He knew who
8 the third-party administrator was. He knew what their role
9 was. So for him to say that I didn't learn it until -- that
10 fact of the third-party administrator's role until the
11 deposition this year, completely ignores the history of the
12 course of dealings between the parties as plan fiduciaries
13 and as third-party administrators.

14 Therefore, as early as 2000, Criscito had to have
15 been aware their potential obliviousness to the valuation
16 inaccuracies but waited 10 years, two years into this case
17 after discovery's been ongoing, depositions have been taken,
18 to bring this -- to bring this third-party complaint.
19 Criscito cannot and has not sufficiently explained his delay
20 and failure to take advantage of previous opportunities to
21 implead these third-party defendants, and therefore, the
22 Court finds there's been undue delay.

23 Finally, I want to talk about futility, and I want
24 us to begin with what we talked about earlier during oral
25 argument, which is indemnification. Indemnification is an

1 equitable doctrine that allows the court to shift the costs
2 from tort-feasor to another. That's well settled in the
3 Johns-Manville case, 116 N.J. 504 (N.J. 1989). One branch of
4 common law indemnity shifts the liability from one who is
5 constructively or vicariously liable to the tort-feasor who
6 is primarily liable. A corollary to this principle is that
7 one who is primarily at fault may not obtain indem --
8 indemnity from another tort-feasor.

9 Accepting Criscito's allegations as true, he is
10 primarily liable to plaintiffs based on intentional
11 wrongdoing, and thus, may not seek indemnity from APC,
12 Warnock, and Eck for indemnity, and therefore the indemnity
13 claims fail as a matter of law.

14 I reach a similar conclusion with respect to
15 contribution, and I rely on the Second Restatement of Torts,
16 § 886(a)(1), which talks about contribution, and it says,
17 first that when two or more persons become liable in tort to
18 the same person for the same harm, there's a right of
19 contribution among them, even though judgment has not been
20 rendered against or all of them, but that there is "no right
21 of contribution in favor any tort-feasor who has
22 intentionally caused the harm."

23 Here, plaintiffs' ERISA action is based on
24 Criscito's fraud, while Criscito's third-party claims are
25 based upon negligence.

1 As Criscito is alleged to have intentionally caused
2 harm to plaintiffs, he cannot maintain a cause of action for
3 common-law contribution against APC, Warnock, or Eck. To
4 hold otherwise, would be aiding Criscito, who has been
5 alleged to have deliberately done harm to plaintiffs. This
6 is not a situation where Criscito is alleged to have acted
7 negligently and he is an equal tort-feasor with the
8 third-party defendants. As such, he fails to state a claim
9 for common-law contribution.

10 So for those reasons, the Court finds that Criscito
11 cannot maintain a third-party complaint for indemnification
12 or contribution, and his motion for leave to file third-party
13 complaint is denied. And I will sign an order to that effect
14 today. I believe one had been submitted.

15 Okay. Why don't we talk a little bit about
16 discovery and where we are with respect to discovery in this
17 case.

18 MR. CHARME: Discovery is done, Your Honor, because
19 as a matter of fact, what I would like to do is have the
20 Court set a pretrial conference date and then start getting
21 the pretrial order done, if it would be acceptable to
22 Your Honor.

23 THE COURT: Let me stop and ask you two questions,
24 Mr. Charme. One is: Will there be any summary judgment
25 motions?

1 MR. CHARME: That leads to a different point I was
2 going to make. I received an ex- -- a four-page expert
3 report from Mr. Kern via email on Friday. The report is
4 missing some of the prerequisites of Rule 26, such as --

5 THE COURT: Let me stop you further. Are you --
6 have you submitted any expert reports?

7 MR. CHARME: Yes, I did.

8 THE COURT: Okay.

9 MR. CHARME: That was done on April 15th.

10 THE COURT: Okay. And when was his -- when were
11 his due?

12 MR. CHARME: His was due Friday.

13 THE COURT: And he sent you a report.

14 MR. CHARME: He sent me a report. But it's
15 incomplete in terms of complying with Rule 26.

16 THE COURT: Okay. Have you had a meet-and-confer
17 with him to see if he can give you the editions?

18 MR. CHARME: Well, I sent the let- -- I sent him a
19 letter this morning.

20 THE COURT: Okay.

21 MR. CHARME: I don't anticipate there is going to
22 be an issue on that. The only thing is, Your Honor, you
23 provided that each side had 20 days from receipt of a report
24 to --

25 THE COURT: You can have more time to take the

1 depositions, if you need them.

2 MR. CHARME: Okay.

3 THE COURT: Not a problem.

4 Are you going to be filing any summary judgment
5 motions?

6 MR. CHARME: I'm not sure.

7 THE COURT: Well, I need to know because, if not,
8 I'll give you -- it's a case that's assigned to Judge Brown
9 in Trenton. He will promptly give you a trial date, if
10 there's no motions pending. If there are motions pending,
11 he'll hear the motions first. So you're at the end of
12 discovery. You have everything in. Have you made a -- it
13 doesn't -- it sounds like it would be tough to prevail on
14 summary judgment on a fraud case.

15 MR. CHARME: Yes, that's -- that's correct,
16 Your Honor. So I don't believe we'll be making a motion.

17 THE COURT: Okay. And what about any further
18 settlement discussions? Are they realistic? Do you want to
19 come in for another conference? Do you want to -- I can give
20 a date for a final pretrial conference, not a problem.

21 MR. CHARME: Your Honor, if I might just tell you
22 where we are.

23 THE COURT: Okay. Good. Do you want to go off the
24 record, since we're talking about settlement?

25 MR. CHARME: Yeah, go off the record.

1 THE COURT: Okay.

2 (Pause in proceedings)

3 THE COURT: -- five days before the pretrial
4 conference. Tell me when you want to get ready for the
5 pretrial. Do you want to do it in August? Do you want to do
6 it in September? You tell me.

7 MR. CHARME: As I understand the --

8 THE COURT: I'll give it to you next week if you --
9 I mean, I'll do it as quickly as you want it.

10 MR. CHARME: Well, Your Honor, I have the last
11 pretrial order that you signed, and it says that 10 days
12 before the pretrial conference, you want the final pretrial
13 order and all of the other stuff.

14 THE COURT: Right. But I'll do it -- you know what
15 I'd like to do is I can assure you that I can give you a
16 prompt trial with Judge Brown. So I want to have that
17 pretrial order in before 10 days. I'm not sure what the
18 trial date's going to be. But you tell me how quickly you
19 can -- you can work together to get a final pretrial order
20 done. If you want July, August, September, I'm flexible.

21 MR. CHARME: Okay. We'd like -- how about if we
22 submit the pretrial order by September 30?

23 THE COURT: Could we do a little bit earlier in
24 September because, you know, he may be ask- -- why don't we
25 try to do it like mid-September?

1 MR. CHARME: That's fine.

2 THE COURT: Is that okay? Okay. That gives you
3 the summer to take the two depositions, if you want to take
4 them, and to get the -- is anyone observant of the Jewish
5 holidays?

6 MR. CHARME: Yes.

7 THE COURT: Okay. So let me see where they are.
8 Do you have your calendar? Do you know when they are? Jess,
9 can you help me out? Okay. It's early in September. Okay.
10 Yom Kippur's on a weekend. I have a trial the week of
11 September 20th. So I can do it -- is it too soon to do it
12 the week of the 13th?

13 MR. KERN: Your Honor, I am on trial most of
14 September and October.

15 THE COURT: You have to find a day to come in
16 because Judge Brown will have you come in on a Saturday.

17 MR. KERN: Okay.

18 THE COURT: Or a Friday night or something. So you
19 tell me, you -- I'll work with you, but you can't just say
20 I'm out of the box in September and October. I can move it
21 till August, but that'll probably be more burdensome. I'm
22 trying to work with you.

23 MR. KERN: You want dates now? If you give me two
24 minutes, I --

25 THE COURT: Sure.

1 MR. KERN: I'm -- at trial on September 23, -4, -8
2 and 30, and then October 1, 7, 8, 14, 15, 21, and 22.

3 THE COURT: Why don't we do Friday, September 17th?
4 The 17th is the holiday, so we'll do it in the morning at
5 10 o'clock? What holiday is that? That's the eve of Yom
6 Kippur. It doesn't start till that evening. Is that going
7 to be a problem?

8 MR. CHARME: No.

9 THE COURT: Okay. Good. So we'll do it early and
10 get you out of here early. So why don't we say
11 September 17th at 10 a.m. and get me the pretrial the day
12 before, okay? And come with your calendar so we can talk
13 about a trial with Judge Brown. I'll see when he's
14 available.

15 How long do you think the trial will be?

16 MR. CHARME: Maybe a week.

17 THE COURT: Okay. I will send a form -- a final
18 pretrial order order, and I will give you a copy of Judge --
19 the sample for Judge Brown's, okay?

20 MR. KERN: Judge, before we do that, I think there
21 may be a summary judgment motion --

22 THE COURT: You can file it at any time. Judge
23 Brown has no rules, but I'm not going to adjourn the final
24 pretrial.

25 MR. KERN: Okay.

1 THE COURT: Okay. So September 17th at 10 -- the
2 defendant's going to move for summary judgment?

3 MR. KERN: Yup.

4 THE COURT: Okay. All right. September 17th at
5 10 o'clock. Good luck, everyone. I will see you then.

6 MR. CHARME: Thank you, Judge.

7 MR. AGNELLO: Thank you, Judge.

8 (Conclusion of proceedings at 12:50 p.m.)
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

Certification

22

Certification

I, SARA L. KERN, Transcriptionist, do hereby certify that the 22 pages contained herein constitute a full, true, and accurate transcript from the official electronic recording of the proceedings had in the above-entitled matter; that research was performed on the spelling of proper names and utilizing the information provided, but that in many cases the spellings were educated guesses; that the transcript was prepared by me or under my direction and was done to the best of my skill and ability.

I further certify that I am in no way related to any of the parties hereto nor am I in any way interested in the outcome hereof.

S/ *Sara L. Kern*

July 6, 2010

Signature of Approved Transcriber

Date

Sara L. Kern, CET**D-338
King Transcription Services
65 Willowbrook Boulevard
Wayne, NJ 07470
(973) 237-6080

EXHIBIT 5

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL ACTION CASE NO. 2:08-CV-1567

DR. FADI CHAABAN; DR. SABINO R. TORRE, DR.
CONSTANTINOS A. COSTEAS and DR. ANTHONY J.
CASELLA, as Trustee of Diagnostic & Clinical:
Cardiology, P.A. Profit Sharing Plan,

Plaintiffs,

vs.

DR. MARIO A. CRISCITO,

Defendant.

Wednesday, July 15, 2009

Deposition of BRIAN WARNOCK, VOLUME II,
before Nancy A. Miani, a Certified Court Reporter,
License No. XI00814, and a Notary Public of the State
of New Jersey at the offices of WITMAN, STADTMAUER,
ESQS, 26 Columbia Turnpike, Florham Park, New Jersey,
on Wednesday, July 15, 2009, at 10:10 a.m.

MIANI COURT REPORTING
CERTIFIED COURT REPORTERS
1741 DANIEL COURT
WALL, NJ 07719
(732) 681-4776

ORIGINAL

1 A P P E A R A N C E S:

2 WITMAN, STADTMAUER, ESQS.
26 Columbia Turnpike
3 Florham Park, NJ 07932
By: STEPHEN M. CHARME, ESQ.
4 Attorneys for the Plaintiffs

5 KERN, CONROY & SCHOPPMANN, P.C.
1120 Route 22 East
6 Bridgewater, NJ 08807
BY: STEVEN KERN, ESQ.
7 AND CHARLES H. NEWMAN, ESQ.
Attorneys for the Defendant

8 ALSO PRESENT:

9 Anthony Casella, M.D.

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 A. Well, I'm getting confused. Marysue
2 McCarthy --

3 Q. Was Morgan Stanley.

4 A. Then it's Morgan Stanley then. Then I
5 have no idea about that the Solomon Smith Barney.

6 Q. Well, certainly as late as December,
7 2002, you were aware there was a Smith Barney account,
8 correct?

9 A. I would have to see -- well, 2002, yes.

10 Q. And you have --

11 A. According to this, yes, there was
12 \$739,000 in it.

13 Q. You have no information concerning what
14 happened to the monies in that account from 2002 to
15 the present. Is that what you're telling me?

16 A. What I'm aware of is all the money that
17 was left in the commingled account -- and I don't know
18 the differentiation between these two accounts -- was
19 all rolled over, and the final rollover was either
20 2005 or 2006, where it went to Dr. Criscito's account.

21 Q. And what --

22 A. That was when it was like the four
23 million dollar number.

24 Q. What's the basis of that understanding?

25 A. That came from Dr. Criscito, that all the

1 money had been paid out, and there was no money left
2 in the commingled account. The commingled account was
3 basically closed out in 2000, except for the money
4 that was still there for Dr. Criscito, and then
5 Foggio's portion.

6 Q. If --

7 A. It was around \$20,000.

8 Q. If you were to learn that through today,
9 the Smith Barney account was not rolled over, that
10 would be inconsistent with your understanding,
11 correct?

12 A. That would be inconsistent with my
13 understanding.


14 Q. And the new trustees of the plan have
15 never told you that monies remain in the Smith Barney
16 account, I take it?

17 A. I'm not aware of that. I'm not aware of
18 that. I can tell you Dr. Casella spoke to Dominique,
19 and told her that Dr. Criscito had taken money out of
20 an account, I don't recall the name of the broker or
21 what broker, whether it was Smith Barney or not, that
22 it had been paid out, he had taken it out of that
23 account, 2007 or 2008, I believe it was 2008, and Dr.
24 Casella spoke to the broker about it. The money was
25 since returned to that account. So we are aware there

C E R T I F I C A T I O N

I, NANCY A. MIANI, a Certified Court Reporter and a Notary Public, License No. XI00814, do hereby certify that the foregoing witness, ^ , was duly sworn by me on the date indicated, and that the foregoing is a true and accurate transcription of my stenographic notes.

I further certify that I am not employed by nor related to any party to this action.



NANCY A. MIANI, C.S.R.
LICENSE NO. XI00814

EXHIBIT 6



Ref: 00007518 00054321

AT SMITH BARNEY

Client Statement

October 1 - October 31, 2007

Page 1 of 8

J07000007518 3073044F01 WSC00115A
 DIAGNOSTIC AND CLINICAL
 CARDIOLOGY PA MPPP 4/1/76
 DR MARIO CRISCITO
 32 CHELSEA DRIVE
 LIVINGSTON NJ 07039-3420

Account number 416-30833-16 707

Your Broker/Dealer is
CITIGROUP GLOBAL MKTS INC.

Your Financial Advisor

Branch Phone: 800 624 0263

Allan Yarkin/ Hank Boyce

1000 E. HALLANDALE

BEACH BLVD

HALLANDALE FL 33009

954 457 1560

Email: allan.d.yarkin@smithbarney.com

www.smithbarney.com

Citigroup Global Markets Inc., member NYSE, NASD, other principal exchanges, and the Securities Investor Protection Corporation (SIPC). Smith Barney is a division and service mark of Citigroup Global Markets Inc. and its affiliates and is used and registered throughout the world. Citi and Citi with Arc Design are trademarks and service marks of Citigroup Inc. and its affiliates, and are used and registered throughout the world. Working WealthSM is a service mark of Citigroup Global Markets Inc.

Account value	Last period	This period	%	Cash, money fund, bank deposits	This period	This year
Money fund	\$ 2,560.66	\$ 2,570.94	.30	Opening balance	\$ 2,588.78	
Bank Deposit Program SM -principal	28.12	1,120.28	.13	Securities bought and other subtractions	0.00	
Common stocks & options	885,340.46	886,826.45	99.57	Securities sold and other additions	1,120.00	
Total value	\$ 887,929.24	\$ 886,517.67	(100.00)	Withdrawals	(28.14)	(28.14)
				Money fund earnings reinvested	10.28	
				Money fund transfers	0.00	0.00
				Bank Deposit Program SM interest reinvested	.28	
				Bank Deposit Program SM interest credited	.02	
				Closing balance	\$ 3,691.22	

A free credit balance in any securities account may be paid to you on demand. Although properly accounted for on our books and records, these funds may be used for our business purposes.

Earnings summary	This period	This year
Other dividends	\$ 0.00	\$ 32.06
Money fund earnings	10.28	100.77
Bank Deposit Program SM	.30	.70
Total	\$ 10.58	\$ 133.53

Additional summary information	This period	This year
FRGN tax withheld	\$ 0.00	\$ 8.02

Portfolio summary	This period	This year
Beginning total value (excl. accr. int.)	\$ 887,929.24	\$ 955,236.86
Net security deposits/withdrawals	(10,465.23)	(10,465.23)
Net cash deposits/withdrawals	(28.14)	(28.14)
Beginning value net of deposits/withdrawals	877,435.87	944,742.49
Total value as of 10/31/2007 (excl. accr. int.)	\$ 886,517.67	\$ 860,517.67
Total return	(\$ 16,918.20)	(\$ 84,224.82)

citi smith barney



Client Statement

October 1 - October 31, 2007

AT SMITH BARNEY

Ref: 00007518 00064222

Account number 416-30833-15 707

DIAGNOSTIC AND CLINICAL

Gain/loss summary	This period	This year
Realized gain or (loss)	(\$ 1,085.65)	(\$ 1,112.70) LT
Unrealized gain or (loss) to date		\$ 0.00 ST
		203,789.95

PORTFOLIO DETAILS

Your holdings are valued using the most current prices available to us. In most cases, these values are as of 10/31/07, but in some cases our sources are unable to provide timely information. To see the date of the most recent price update, please view your account online at www.smithbarney.com. Securities purchased or sold are included or excluded in this section as of the trade-date. This section may include securities that have not settled as of this statement closing date. Please see the "Unsettled Purchases/Sales" section for more information. Dividend yield is the estimated annual income, assuming the current dividend, divided by the security's market price at the end of the statement period. We do not guarantee the accuracy of the prices reflected on the statement nor do these prices represent levels at which securities can be bought or sold. Please Note: unrealized gain/(loss) is being shown for informational purposes only and should not be used for tax preparation without the assistance of your tax advisor.

Money fund

Number of shares	Description	Current value	Accrued dividends	Annualized % dividend yield	Anticipated income (annualized)
2,670.94	WESTERN ASSET MONEY MARKET FUND CLASS A	\$ 2,670.94	\$ 0.00	4.73 %	\$ 121.60
Total money fund		\$ 2,670.94	\$ 0.00	4.73 %	\$ 121.60

Bank Deposit Program**

Balances are FDIC insured up to \$100,000 per institution, subject to combined total of all your deposits, including those outside this account.

Principal	Description	Current value	Accrued interest	Annualized % return	Anticipated income (annualized)
1,120.28	CITIBANK NA SOUTH DAKOTA BANK DEPOSIT PROGRAM	\$ 1,120.28	\$ 0.00	4.73 %	\$ 52.98
Total Bank Deposit Program		\$ 1,120.28	\$ 0.00	4.73 %	\$ 52.98

citi smith barney



Client Statement

October 1 - October 31, 2007

AT SMITH BARNEY

Ref: 00007518 00064223

DIAGNOSTIC AND CLINICAL Account number 416-30833-16 707

Common stocks & options

Citi Investment Research and independent, third-party research ratings may be shown for certain securities. All research ratings represent the "opinions" of the research provider and are not representations or guarantees of performance. Because the research report contains more complete information regarding the analyst's opinions, analysis, and rating, you should read the entire research report and not infer its contents from the rating. Citi Investment Research stock recommendations include an investment rating and risk rating. The Investment Rating Code (L, M, H or S) is a function of Citi Investment Research's expectation of total return (forecast price appreciation and dividend yield within the next 12 months) and a Risk Rating. The Risk Rating (L, M, H or S) represents the stock's expected risk, taking into account price volatility and fundamental criteria. Please refer to the end of this statement for a guide describing Citi Investment Research ratings. Independent, third-party research ratings have been normalized by such third-party providers to a 1 (Buy), 2 (Hold), and 3 (Sell). Citi Investment Research is not the author of, does not take responsibility for, and does not guarantee the accuracy, completeness, or timeliness of the independent, third-party research. Except as noted by an asterisk (*), each independent research provider was selected by an Independent Consultant as required under the Global Research Analyst Settlement.

Quantity	Description	Symbol	Date acquired	Cost	Share cost	Current price	Current value	Unrealized gain/(loss)	Average % yield	Anticipated Income (annualized)
96,3711	ALCATEL-LUCENT ADR	ALU	01/27/99	\$ 19,994.71	\$ 207,888	\$ 9.69	\$ 933.84	(\$ 19,060.87)	LT	
54,6103	Rating: Citigroup : 1H Argus : 2 Morningstar : 1 S&P : 2		01/27/99	11,342.44	208,108	9.69	529.17	(10,813.27)	LT	
1,0186	Reinvestments to date			92.66	90,987	9.69	9.87	(82.79)	LT	
1,6896	Reinvestments to date			24.05	14,234	9.69	16.37	(7.68)	ST	
153,6896				31,453.86	204,658		1,489.25	(29,984.61)		3,632
27,2629	LSI CORP	LSI	01/27/99	3,986.78	146,914	6.60	179.94	(3,806.84)	LT	
15,449	Rating: S&P* : 2		01/27/99	2,281.59	147,071	6.60	101.96	(2,159.63)	LT	
2881	Reinvestments to date			18.48	64,074	6.60	1.90	(16.56)	LT	
43				6,286.83	145.74		283.80	(6,983.03)		
45,530	SYMANTEC CORP Rating: Citigroup : 1M Argus : 2 S&P : 2	SYM	01/14/99	615,306.81	13,514	18.78	855,063.40	239,747.59	LT	
Total common stocks and options										
				1,653,046.90			\$ 968,525.45	(\$ 7,98)	ST	3.63
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	0.02
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	
								(\$ 7,98)	ST	
								\$ 203,807.83	LT	



Client Statement

October 1 - October 31, 2007

Ref: 00007518 00054224

AT SMITH BARNEY

DIAGNOSTIC AND CLINICAL Account number 416-30833-16 707

Other security activity Date	Activity	Description	Quantity	Value
10/16/07	Withdrawal	ALCATEL-LUCENT ADR FROM 416-30833-01 TO 416-6B419-01 DIRECT ROLLOVER DIST-IRA	-153.6896	\$ -1,429.31
10/16/07	Withdrawal	AVAYA INC FROM 416-30833-01 TO 416-6B419-01 DIRECT ROLLOVER DIST-IRA	-64	-1,107.84
10/16/07	Withdrawal	LSI CORP FROM 416-30833-01 TO 416-6B419-01 DIRECT ROLLOVER DIST-IRA	-43	-313.90
10/16/07	Withdrawal	SYMANTEC CORP FROM 416-30833-01 TO 416-6B419-01 DIRECT ROLLOVER DIST-IRA	-45,530	-942,471.00
10/16/07	Deposit	ALCATEL-LUCENT ADR FROM 416-6B419-01 TO 416-30833-01 ROLLOVER CONTRIBUTION REVERSE DISTRIBUTION	153.6896	1,430.85
10/16/07	Deposit	AVAYA INC FROM 416-6B419-01 TO 416-30833-01 ROLLOVER CONTRIBUTION REVERSE DISTRIBUTION	64	1,111.68
10/16/07	Deposit	LSI CORP FROM 416-6B419-01 TO 416-30833-01 ROLLOVER CONTRIBUTION REVERSE DISTRIBUTION	43	315.19
10/16/07	Deposit	SYMANTEC CORP FROM 416-6B419-01 TO 416-30833-01 ROLLOVER CONTRIBUTION REVERSE DISTRIBUTION	45,530	931,999.10
Net value of securities deposited/(withdrawn) + capital contributions				\$ -10,465.23

citi smith barney



Ref: 00007518 00054228

AT SMITH BARNEY

Client Statement

October 1 - October 31, 2007

Page 5 of 8

DIAGNOSTIC AND CLINICAL

Account number 416-30833-16 707

Withdrawals

Date	Description	Reference no.	Amount	Reference no.	Amount
10/16/07	TRF 0.02		.02		
	TO A/C 416-68419-1-6				
	FROM 416-30833-01				
	TO 416-68419-01				
	CASH JOURNAL FROM IRA				
	DIRECT ROLLOVER DIST-IRA				
	Total withdrawals				\$ 28.14

Money fund activity

Opening money fund balance			\$ 2,560.66
Date	Activity	Description	Amount
10/16/07	Withdrawal	WESTERN ASSET MONEY MARKET FUND CLASS A FROM 416-30833-01 TO 416-68419-01 DIRECT ROLLOVER DIST-IRA	-2,560.66

All transactions are traded at \$1.00 per share.

Date	Activity	Description	Amount
10/16/07	Deposit	WESTERN ASSET MONEY MARKET FUND CLASS A FROM 416-68419-01 TO 416-30833-01 ROLLOVER CONTRIBUTION REVERSE DISTRIBUTION	2,560.66
		MONEY FUND EARNINGS REINVESTED (SEE DETAILS UNDER EARNINGS DETAILS)	10.28
		Closing balance	\$ 2,570.94
		Total money fund transfers	\$ 0.00

Bank Deposit Program™ activity

The term **DEPOSIT** typically refers to client initiated deposit of funds. The term **AUTO-DEPOSIT** typically refers to the "sweep" of funds into a Program Bank that results from proceeds of a transaction, a dividend from a stock or interest from a bond. Conversely, **WITHDRAWAL** is the term that refers to transactions that cause funds to be redeemed from your Program Bank, such as the payment for an investment purchase or the payment of FMA checks that you have written.

Opening balance

Date	Activity	Description	Amount
10/16/07	Withdrawal	BANK DEPOSIT PROGRAM	-28.12

Closing balance

Date	Activity	Description	Amount
10/29/07	Autodeposit	BANK DEPOSIT PROGRAM	1,120.00
		BANK DEPOSIT PROGRAM INTEREST CREDITED (SEE DETAILS UNDER EARNINGS DETAILS)	28
		Closing balance	\$ 1,120.28

citi smith barney



AT SMITH BARNEY

Ref: 00007518 00054226

Client Statement

October 1 - October 31, 2007

Page 8 of 8

DIAGNOSTIC AND CLINICAL

Account number 416-30833-16 707

EARNINGS DETAILS

The tax status of earnings is primarily based on the tax status of the underlying securities. For tax purposes, the tax status of the underlying securities is not of your concern.

Money fund earnings

Date	Description	Comment	Taxable	Non-taxable	Amount
10/31/07	WESTERN ASSET MONEY MARKET FUND CLASS A	REINVESTED FOR PERIOD 10/01/07-10/31/07 31 DAYS AVERAGE YIELD 4.73 %	\$ 10.28		\$ 10.28
Total earnings from money fund					
			\$ 10.28	\$ 0.00	\$ 10.28

Bank Deposit ProgramSM Interest

This section contains interest credited to your account. Accrued interest is not included. See Portfolio details section for accrued interest information.

Date	Description	Comment	Taxable	Non-taxable	Amount
10/16/07	CITIBANK NA BANK DEPOSIT PROGRAM	FULL ROM ACCRUED INTEREST	\$.02		\$.02
10/31/07	CITIBANK NA SOUTH DAKOTA BANK DEPOSIT PROGRAM				
		REINVESTED FOR PERIOD 10/01/07-10/31/07 31 DAYS AVERAGE YIELD 4.73 %	.28		.28
Total Bank Deposit Program Interest credited to account					
			.28		.28
Total Bank Deposit Program Interest reinvested					
			\$.30	\$ 0.00	\$.30

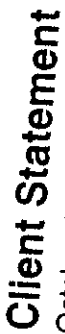
GAIN/LOSS DETAILS

Please note, this material is being prepared for informational purposes only and should not be used for tax preparation without the assistance of your tax advisor. Trades are allocated using the FIFO (first in-first-out) method. Day traders should therefore not rely on this section for day trading results. Your reinvestment activity has been summarized. Single lines have been designated to distinguish Short-term (ST) or Long-term (LT) information. Detailed information will be available at year-end in your 1099 Year-end summary.

Realized gain or loss

Description	Original trade date	Closing trade date	Quantity	Purchase price	Sale price	Cost basis	Proceeds	Realized gain or (loss)
AVAYA INC	01/27/99	10/26/07	40.7869	\$ 34.81		\$ 1,404.80	\$ 713.77	(\$ 691.03) LT
		Tender						
	01/27/99	10/26/07	23.1126	34.848		796.90	404.47	(392.43) LT
		Tender						
Reinvestments	10/26/07		.1006	39.303		3.95	1.76	(2.19) LT
		Tender						
Total			64			\$ 2,205.65	\$ 1,120.00	(\$ 1,085.65)

citi smith barney



Page 7 of 8

October 1 - October 31, 2007

Realized gain or loss

Description	LSI LOGIC CORP
-------------	----------------

DIAGNOSTIC AND CLINICAL

Account number 416-30833-16 707

Original trade date	Closing trade date	Quantity	Purchase price	Sale price	Cost basis	Proceeds	Realized gain or (loss)
01/27/99	04/03/07	.1288	\$ 146,914		\$ 18.54	\$ 1.32	(\$ 17.22) LT
01/27/99	04/03/07	.0719	147,071				
Reinvestments	04/03/07	.0013	53,846		10.52	.75	(9.77) LT
Total		.2			.07	.01	(.06) LT
Total Long Term this period					\$ 29.13	\$ 2.08	(\$ 27.05)
Total realized gain or (loss) this period							(\$ 1,085.65)
Total Long Term - Year-to-date					\$ 2,205.86	\$ 1,120.00	(\$ 1,085.86)
Total Short Term - Year-to-date							(\$ 1,112.70)
Total realized gain or (loss) Year-to-date					\$ 2,234.78	\$ 1,122.08	(\$ 1,112.70)

citi smith barney